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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1952.

No. 295.

ARNETT M. HOWARD, ET AL., - - Appellants,

versus

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL., - - - - - - - - - - Appellees.

Appeal from the Court of Appeals of Kentucky.

BRIEF FOR APPELLEES.

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City of Louisville,

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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IN THE

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No. 295.

ARNETT M. HOWARD, ET AL., - - *Appellants,*

v.

THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE, ET AL., - *Appellees.*

BRIEF FOR APPELLEES.

STATEMENT.

This suit was brought on by the City of Louisville seeking through its agent, The Commissioners of the Sinking Fund, to enforce its general and nondiscriminatory occupation tax upon appellants, who are employees of the United States Government. The tax is levied upon appellants pursuant to a permissive act of the Congress. It is not a conflict of sovereigns in which the Federal Government is interested in behalf of its functioning agencies. It is throughout a controversy between the local government and its subject taxpayers.

The individuals sought to be taxed are seeking to evade the impact of the taxing ordinance through an

interpretation of the Act of Congress which would not extend the terms of the Act to them; and further through a construction of the clause of the Federal Constitution which was drafted and has been interpreted to settle questions of primacy of sovereignty between the United States and local governments operating in the same area.

As the main line of resistance, the appellants have invoked Article 1, Section 8, Clause 17, of the Federal Constitution to protect their individual interests from the local government. As a mobile reserve in case of a break-through, they argue exemption from the terms of Title 4, U. S. C. A., Section 106, permitting local governments to levy the tax on Federal employees working within Federal reservations.

JURISDICTION.

We consider this a purely local problem, a conflict of local interest between the State and its political subdivisions and its own citizens. The contention of the appellants, however, that the City's annexation ordinance under State general law and the City's general law regulating taxing of individuals within its boundaries, as applied to the instant Federal reservation, is repugnant to Article 1, Section 8, Clause 17, of the United States Constitution and the adverse decision by the Kentucky Court of Appeals on that question, probably gives this Court jurisdiction to review the State Court of Appeals, Title 28, U. S. C. A., Section 1257 (2); Hamburg Amr. S. S. Co. v. Grube, 196 U. S. 407.

FACTS.

Appellants sued the appellee, Commissioners of the Sinking Fund of the City of Louisville, for a declaration of rights of the parties, praying that it be adjudged that appellants were not subject to the payment of the occupation tax or license fee imposed by the ordinance of the City of Louisville, and further prayed an injunction of the Commissioners from attempting to collect the tax (R. 8). The Commissioners of the Sinking Fund is a statutory body set up by the Legislature as an agency of cities of the first class (Louisville) to administer and pay the bonded debt of those cities (91.130, Kentucky Revised Statutes), and to collect fees imposed by the boards of aldermen of such cities (91.200, Kentucky Revised Statutes) (R. 2).

Appellants' petition stated, and it was taken as admitted by the general demurrer of the appellees (R. 11), that appellants were employed within the territory of United States Naval Ordnance Plant (R. 5); that the land upon which the Naval Ordnance Plant was located was acquired by the United States in 1940 for such purpose and such acquisition was consented to by a general statute of the Commonwealth of Kentucky (R. 3); that exclusive jurisdiction over the land was accepted in 1941 by the United States Government and acknowledged by the State in the prescribed manner (R. 4). In 1940 and 1941 the land was outside of the city boundary. In 1950 the land containing the Naval Ordnance Plant was included as part of a larger tract annexed to the City (R. 3). After the act of

annexation, the appellee Commissioners, through the appellee, Brumleve, attempted to assess the appellants for the City's general occupation tax, based on appellants' income earned as employees of the United States Government upon the land in question (R. 5).

Appellants also pleaded their theory of the case as conclusions, and not necessarily admitted by the general demurrer, that because of the acquisition of the land by the United States with full consent by the State and full and exclusive jurisdiction accepted by the Federal Government, it could not thereafter be annexed to the City by city ordinance enacted pursuant to a State statute. Appellants have continued to contend that this particular land has remained an island outside of the City and so beyond the authority of the City to tax occupations performed thereon (R. 4).

CONGRESS HAS RECEDED TO THE LOCAL GOVERNMENT THE POWER TO TAX APPELLANTS.

Appellants claim that the ordinance of annexation by the City pursuant to State statute and the assessment of the occupation tax by the appellees is an assertion by the City of jurisdiction over the Federal property. The claim is far too broad. The City is exercising its power of taxation only within the strict limits authorized by the Congress; it is asserting that small part of its otherwise extensive jurisdiction specifically allowed it.

This land is admittedly such over which Congress has exclusive legislative power under the Federal Con-

stitution and were it not for the Enabling Act of Congress the tax of the City on appellants would not be attempted by the Commissioners.

Title 4 U. S. C. A., Sections 105-110 (1951 Cumulative p.p.), sometimes referred to hereafter as the Buck Act, authorizes local political subdivisions to levy in Federal areas most of the common forms of revenue tax on individuals where the tax is not directly upon any function or agency of the United States. Pertinent here is Section 106, which provides:

"Section 106. Same; income tax.

"(a) No person shall be relieved from liability for any income tax levied by any State, or by any duly constitued taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area."

Section 110 (c) following defines "income taxes":

"Section 110. Same; definitions.

"As used in sections 105-109 of this title—

"(c) The term 'income tax' means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts."

The section of the Louisville Ordinance (Ordinance 83, Series 1950) levying the occupation tax is:

"Section 1. On and after July 1, 1950, every person, association, corporation or other entity engaged in any occupation, trade, profession, or other activity in the City shall pay into the Sinking Fund of the City for the purposes set forth under Section 91.200 of the Kentucky Revised Statutes as amended by an Act of the General Assembly of 1950, an annual license fee for the privilege of engaging in said activities, which license fee shall be *measured by* one per centum of (a) all salaries, wages, commissions and other compensations earned by every person in the City for work done or services performed or rendered in the City; and (b) the net profits of all businesses, professions, or occupations from activities conducted in the City."

In discussing the import of this tax in Cook v. Commissioners, 312 Ky. 1, 226 S. W. 2d 328, and the assessment of United States Post Office employees therefor as a burden upon the Federal Government, aside from permissive provisions of Congressional Acts, the Kentucky Court of Appeals wrote:

"The sole question for our determination is whether employees of the United States Government are immune from liability for the tax imposed by Ordinance of the City of Louisville, and which was declared to be valid by this Court in City of Louisville v. Sebree, 308 Ky. 420, 214 S. W. 2d 248. In holding the Ordinance to be valid, we rejected the contention that it imposed an income tax and adopted the contention of the City that the Ordinance 'lays the tax upon the privilege of working * * * within the City, and

only measures the value of the privilege by the amount of earnings or net profit.' "

This city tax which "lays the tax upon the privilege of working within the City and only measures the value of the privilege by the amount of earnings or net profit" seems to fit neatly into the definition (Section 110 (c)) of tax authorized by the Congress to be levied on persons "receiving income from transactions occurring or income earned in such (Federal) areas" (Section 106).

Appellants insist, however, that Congress has allowed the imposition of a "local income tax," and as the Kentucky Court has denied that this occupation tax is an "income tax," that Act of Congress has no application. We think it obvious that the definition of income tax in Section 110 (c) of that Act to be any as may be "measured by net income, gross income or gross receipts," authorizes the inclusion within the scope of that Act of the popular State levies in the form of use privilege and occupation tax "measured by" income (see 27 Am. Jur., Taxes, Sec. 7) as well as those technically known as income taxes.

According to the Supreme Court of Pennsylvania, in its opinion on the liability for the city tax of Philadelphia Navy Yard workers, this Buck Act and its companion, the Public Employees Salary Act (Title 5 U.S.C.A., Sec. 84 (a)), were directly related to the cases of James v. Dravo Contracting Co., 302 U. S. 134, and Silas Mason Co. v. Tax Commission, 302 U. S. 186, both concerning State "privilege" taxes, as dis-

tinguished from income taxes, based on gross income. These Acts were designed to level the distinction between Federal contractors and employees who theretofore depended upon the accident of place of the taxpayer's residence and the accident of the wording of the various Statute statutes ceding more or less jurisdiction to the Federal Government over lands where the taxpayers earned their income, Kiker v. City of Philadelphia, 346 Pa. 624, 31 A. 2d 289, 296.

One last word on the relation of the Louisville occupation tax to the definitions of the permissive income tax of the Buck Act. In the present case, the Kentucky Court of Appeals determined in its opinion that the Louisville occupation tax was within the terms of that Act (R. 30):

> "The tax clearly falls within the definition made by the Act of Congress."

That finding may well settle the question argued in this section of the brief. This Court has stated many times that it is generally bound to the interpretation given by State courts of State legislation. In the recent case of Aero Mayflower Transit Co. v. Board of R. R. Commissioners, 332 U. S. 495, this Court reiterated its position as to interpretation of local tax statutes, at page 499:

> "We put aside at the start appellant's suggestion that the Supreme Court of Montana has misconstrued the state statutes and therefore that we should consider them, for purposes of our limited function, according to appellant's view of

their literal import. The rule is too well settled to permit of question that this Court not only accepts but is bound by the construction given to state statutes by the state courts."

Whether this Court binds itself to the declaration of the State court or whether it makes its own findings as to the relation of a local tax statute to the definition in the Act of Congress, we are confident that the Louisville occupation tax is within the terms of the Buck Act.

THE STATE DETERMINES THE POLITICAL GEOGRAPHIC LOCATION OF ALL ITS LAND WITHIN ITS BOUNDARIES.

The argument in the Supreme Court of the United States of political geography of the Federal land as opposed to political sovereignty over it, must be done insofar as controlling Federal decisions, by deduction. Political geographic location of Federal areas within a State has never been, and is not here, a concern of the Federal Government since the sovereign interests of the United States have always been secure from interference from local sovereignty. Questions of internal State political boundaries and their relations to Federal enclaves have been problems for the State courts where there have been decisions on the effect of shifting State political boundaries to include Federal property.

Appellees admit that the land on which the Naval Ordnance Plant is situated is under the exclusive ju-

risdiction of the United States. Article 1, Section 8, Clause 17, of the Federal Constitution, reads:

> "The Congress shall have the power * * * to exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings,"

This Naval Ordnance Plant can easily be termed a fort, magazine or arsenal. The fact that it was condemned and not purchased, as provided in Clause 17, does not affect its tenure, Kohl v. U. S., 91 U. S. 367. The fact that the State of Kentucky has given a "consent to acquisition" of the property by the United States, not in the constitutional language of "consent to purchase," does not affect it (see Appendix). The power of exclusive legislation over places acquired under Clause 17 means exclusive jurisdiction over such property, U. S. v. Unzeuta, 281 U. S. 138. And exclusive jurisdiction of the United States is fairly prohibitive of any sovereign Act of the State within that property. Arlington Hotel Co. v. Fant, 278 U. S. 439; Surplus Trading Co. v. Cook, 281 U. S. 647; Standard Oil Co. v. California, 291 U. S. 242; Pacific Coast Dairy Co. v. Department of Agriculture of California, 318 U. S. 285.

Appellants argue that when exclusive jurisdiction of lands within a State is assumed by the United States, such lands cease to be a part of the State. According to their theory, the act of annexation of territory surrounding this Naval Ordnance Plant was a legislative Act by the City and could have no effect upon the land theretofore occupied by the Naval Ordnance Plant. The picture in the extension of the city boundaries is complete, except for the hole in the area annexed, where the core or plug of the Naval Ordnance Plant had been removed some ten years previously. It is awkward to visualize the separation of the earth by the withdrawal of that core even as a legal concept. The only precedent which comes to mind is the island of Leputa, a creature of Jonathan Swift, for a wonder to be visited by Gulliver in his travels. The "Island of Leputa, the Flying or Floating Island is exactly circular, its diameter 7,837 yards, or about four miles and one-half, and consequently contains 10,000 acres. * * * But the greatest curiosity upon which the seat of the island depends is a lodestone of a prodigious size, in shape resembling a weaver's shuttle * * *. By means of this lodestone, the island is made to rise and fall and move from one place to another." By contrast, the Naval Ordnance Plant remains affixed on Strawberry Lane in South Louisville.

The taking and disposition of land by Congress is controlled, of course, by the Constitution. Congress may acquire property under Article 1, Section 8, Clause 17, of the Federal Constitution, or as any other proprietor by contract in its governmental capacity, Col-

lins v. Yosemite Park & C. Co., 304 U. S. 518. By express provision of Article 4, Section 3, the Congress has the power to dispose of property belonging to the United States. There is no provision in the Constitution, nor has the Constitution been so broadened by judicial interpretation, to give the power to Congress to withdraw property or add property to an existing State within the Republic. It may be that the provisions of Clause 17, Section 8 of Article 1, permit such physical setting apart of lands of the States and the physical restoration of same to the States at the end of the use of the United States. But it has never been so decided, nor has any thought of the State's relinquishment of property within its political boundaries been to that effect. Taking at random quotes from 49 American Jurisprudence, States, Territories and Dependencies:

> "Unless otherwise declared by Congress the title of every species of property owned by a territory passes to the state upon its admission to the Union" (p. 231).
>
> "Where the boundary line of a state is once established Congress is without power to alter the line without the state's consent" (p. 240).
>
> "It has been said that the state in its quasi-sovereign capacity has an interest independent of and behind the titles of its citizens in all the earth and air within its domain" (p. 268).

It is our contention that the cession of jurisdiction over its lands by a State to the United States cedes only such jurisdiction that the United States is able

to acquire for its purposes under the Constitution. And the power of Congress to withdraw and restore territory from the States is not within the terms or the intent of the Constitution. In spite of the language of the opinions dealing with the exclusiveness of congressional authority, to the exclusion of State sovereignty in these Federal areas, there is a vestige of State sovereignty remaining which cannot be acquired by the United States because of the limitation of the United States to powers delegated under the Constitution. The vestige of State jurisdiction is sufficient to cover the State's ability to determine its own internal physical boundaries to include or exclude those Federal areas therefrom.

This limitation of Federal jurisdiction was set out in a letter dated February 11, 1856, from Mr. Cushing, the Attorney General, to Mr. Guthrie, the Secretary of the Treasury, concerning the consent of the State of Virginia to the acquisition by the United States of property for post offices. The State of Virginia, in wording its consent, reserved the right to execute process upon the property and to do such other legal "functions as would not be incompatible" with the consent theretofore given. In his letter, 7 Op. Attorney General, 628, Cushing said:

> "Now it is thoroughly settled by numerous adjudications that all such Federal jurisdiction as the Constitution contemplates is acquired by the United States in the mere consent of the state to the purchase; and that upon such consent, jurisdiction of the State ceases, and that of Congress

comes in by virtue of the Constitution. * * *

"* * * the statute recognizes a ceded Federal jurisdiction, co-extensive with the demand of the Constitution of the United States, whatever that may be. It reserves for the State only such authority as may not be incompatible with the constitutional completeness of the authority ceded to the United States * * * but all such rights would remain to the State by operation of law, even if not expressly reserved. For, on the general principle of constructive relation between the United States and each of the states, the former cannot take from a State anything more than is 'within the contemplation' of the Constitution of the United States, however broad and indefinite may be the terms of grant by a particular State."

The exercise by a State, within the entire territory embraced by its external boundaries, of purely administrative functions which are necessary to preserve to the State its rights guaranteed by the Constitution is not inconsistent with exclusive jurisdition of the United States so long as the exercise of such functions does not interfere with any of the constitutional functions of the Federal Government within areas of its sovereignty. The State may not surrender to the Federal Government the right to exercise those means which are necessary to accomplish the powers reserved to it by the Constitution. Among those functions is the right of the local legislature to direct the extent of the boundaries of its municipalities. In 37 Am. Jur., Mun. Corp., Sec. 23, it is said:

"In the absence of constitutional limitations it is generally considered that the power of a state legislature over the boundaries of the municipalities of the state is absolute and that the legislature has power to extend the boundaries of a municipal corporation, or to authorize an extension of its boundaries, without the consent of the inhabitants of the territory annexed, or the municipality to which it is annexed, or even against their express protest."

No mention is made in that quotation of the possible protest of the United States (if such could be conceivable) because of the inclusion of an area under its control within the boundaries of the city by direction of the State Legislature. So far as we have been able to determine, that question of inclusion of Federal areas did not arise until 1944 (and then not by protest of the United States) in the case of Wichita Falls v. Bowen, 143 Texas 45, 182 S. W. 2d 695, after which a note was added in Am. Jur., to Section 26 of the article on Municipal Corporations, wherein it was set out:

"It has been held that annexation of territory by a home-rule city is not precluded by the fact that such territory is a United States military reservation under the exclusive jurisdiction and control of the United States notwithstanding that the power of the city may be curtailed and even suspended during the time the territory is under such jurisdiction and control."

That Texas case was also made the source of the text of 62 Corpus Juris Secundum, Mun. Corp., Sec. 46, p. 133, where it is stated.

> "State property may be included in territory annexed to a municipality as may be territory under exclusive jurisdiction of the federal government."

That Texas case, Wichita Falls v. Bowen, *supra*, involved the municipal control of a bus line operation in and out of the military reservation of Sheppard Field, which was under the exclusive jurisdiction of the Federal Government, and which had just previously been included in territory annexed to the City of Wichita Falls. Bowen contended that the city could not control his rates or levy a tax based on his revenues from his operation within the confines of the airfield. In rejecting his claim and passing on the geographical question of extension of city boundaries, the court said:

> "If we properly interpret Bowen's motion for rehearing, he contends that since Sheppard Field is a United States military reservation, under the exclusive jurisdiction and control of the Federal Government, the City of Wichita Falls had no power to assume jurisdiction over it by annexing it thereto. We are not impressed with this contention. Certainly Sheppard Field is a part of the State of Texas, and this is so even though we concede that it is under the exclusive jurisdiction and control of the United States Government. By the same token, it can be a part of an incorporated city within this State. Of course, the power of the city,

like the power of the State, to exercise jurisdiction and control over its territory may be curtailed, and even suspended, during the time it is under the jurisdiction and control of the United States Government; but that fact would not justify a holding that it cannot become a part of the area of an incorporated city."

Some three years later there arose in the Virginia court the question of annexation by the City of Portsmouth of territory in Norfolk County, within which was the United States Navy Yard, Norfolk County v. City of Portsmouth, 45 S. E. 2d 136. One of the objections to annexation was that the Navy Yard, being under the exclusive jurisdiction of the United States, could not be annexed as part of the city. Apart from the text references above or the authority of Wichita Falls v. Bowen, *supra,* the independent conclusion of the Virigina court was:

"We think the Navy Yard should, nevertheless, be included in the boundary of the annexation area. Its activities are adjacent to and closely associated with the City of Portsmouth * * *. The functions of assessment and collection of income, sales and use taxes which Congress now permits the State to exercise over this Federal area can be performed more conveniently and appropriately through the taxing authorities of the city than those of the county. After such annexation the Navy Yard will occupy the same relation to the city that it now does to the county. This will be the only effect of its inclusion in the area."

These State decisions do not wrestle with the doctrines of the legal effect of transferring exclusive jurisdiction to the United States as is being vigorously urged in this case. It can be inferred, however, from those opinions holding that one political subdivision of the State is substituted for another without disturbing the functions of the Federal Government taking place inside, that there is the innate feeling that the territory is not bodily lifted from the boundaries of the State as a "Flying Island" or "separate province," but that the transfer from one political State entity to the other is possible under the State's inherent power to geographically limit its territory, regardless of the cession of exclusive jurisdiction to the Federal Government.

In the same line of reasoning of non-interference with the functions of the Federal Government by the local authorities during the tenure of the United States govenment of its Federal area is the case of City of Anchorage v. Akers, 100 F. Sup. 2, in the District Court of Alaska, commenting upon the plaintiff's claim of immunity from taxation by the City of Anchorage because he resided on property reserved from the town site of the city for uses of the Alaska Railroad, which was subsequently included in the City. The District Court reasoned:

> "In support of the second ground appellant argues that implicit in the order carving the railroad reserve out of the original town site reserve, it is the intent that the area embraced thereby should not thereafter be included within the cor-

porate limits of Anchorage. This conclusion does not necessarily follow. It appears reasonably clear that the purpose of Executive Order Nos. 2242 was to withdraw the area described from settlement, location, entry and all other forms of appropriation, and reserve it for use in connection with the operation and maintenance of the Alaska railroad. Manifestly the right to include such an area within a municipality depends not on source or kind of title, but upon whether its inclusion would interfere with the purpose for which the area was set aside. Day v. City of Salem, 65 Or. 114, 131 P. 1028, 1030; City of Wichita Falls v. Bowen, 143 Tex. 45, 182 S. W. 2d 695; 2 McQuillin 307, Sec. 7.18. Appellant also suggests the absurdity of the notion that a municipality may exercise its ordinary functions in military and like reservations. But this argument overlooks the fact that the Constitution contemplates the co-existence of state and federal governments, side by side, each supreme within its sphere. The line of demarcation between the two is, in certain situations, often nebulous, with an overlapping of jurisdiction and consequent controversy. But it should be noted that in each case the determinative factor is encroachment in the constitutional sense and the ultimate question is not whether the two function within the same area, but whether there is an interference with the functions of one or the other. Here the inquiry is whether the exercise of the power to tax personal property of residents within the railroad reserve is incompatible with the functions of the United States or the accomplishment of the purposes for which the area was set aside. That a state or political subdivision thereof could not obviously be per-

mitted to exercise its functions within a military reservation in the occupation of the armed forces of the United States does not detract in the slightest from the applicability of the test referred to other reservations. It is not perceived, nor does the appellant point out, how the taxation of the personal property of the residents in the railroad reserve would interfere with the United States in the operation or maintenance of the railroad. Cf. Silas Mason Corp. v. Tax Commission, 302 U. S. 186, etc; James v. Dravo, 302 U. S. 134, etc.; Oklahoma Tax Commission v. Texas Co., 336 U. S. 342, etc. Appellant's argument that personal property in the offices of federal officers and employees within the reserve, is immune from taxation not only discloses a misconception of the law, but assumes the very point to be decided. It would make every federal reservation a sanctuary for federal personnel not unlike that accorded foreign diplomats. It would serve no useful purpose to pursue this alluring fantasy into all its possible ramifications. The analogy is not a true one and does not merit serious consideration or extended discussion. It may, however, be noted in passing that the trend of Supreme Court decisions is to restrict and abrogate tax immunity rather than to extend it."

In Kiker v. City of Philadelphia, cited above, plaintiff sought to evade the city occupational tax by stating that the Philadelphia Navy Yard on which they were employed was not a part of the City of Philadelphia because it had been withdrawn by the assumption of exclusive jurisdiction over the land by the United States. As far as location within political boundaries of the State of Pennsylvania, the court said:

"The area in which plaintiff (Kiker) is employed or engaged * * * is now physically a part of the mainland of this Commonwealth. The reservation is immediately adjacent to Philadelphia, and geographically within its limits, and since December 31, 1940, because of the provisions of Public Act. No. 819 (The Buck Act) is actually a part of that City for the purposes of imposing the tax here under consideration." 31 A. 2d 295.

We insist strongly that there is a vestige of jurisdiction left within the State after Congress has assumed the power to exercise exclusive legislation of the land ceded by the State to the Federal Government. The court below in the instant case had a theory that for purposes of this case, Congress had re-ceded authority to the State to determine in which political boundary Federal areas in the State of Kentucky were to be, upon passage of the act permitting State and local government taxation within the area (R. 29). The Kentucky Court of Appeals reasoned that in 1940 Congress gave the power to local taxing authorities within the states to tax individuals on the Federal areas (the Buck Act), thereby re-ceding to the State authority to determine in which political subdivision those areas should lie for purposes of permitted taxes. The annexation ordinance of Louisville, under the authority of the existing State law, occurred subsequent to such recession and so was effective to include the Naval Ordnance Plant within the confines of the City

of Louisville for purposes of imposing a city occupation tax on individuals therein.

We still argue that the State retains a modicum of jurisdiction which the United States cannot assume upon its assumption of control of the property but we are grateful for the favorable interpretation of the State court.

The last clause of Title 4, Section 106, in which Congress allowed the imposition of the local occupation tax can be read in support of the theory of recession of the Kentucky Court of Appeals. By that section, the taxing authority has full jurisdiction and power to levy and collect the tax in any Federal area within such State to the same extent and with the same effect *as though such area was not a federal area.* By those emphasized words Congress may have placed so much of the plug theretofore withdrawn back into the soil of Kentucky and freed that part from the exclusive power of congressional legislation.

COMPLETE EXCLUSION OF THE STATE FROM FEDERAL PROPERTY IS CHANGING INTO A CONCEPT OF FREEDOM OF THE FEDERAL GOVERNMENT FROM EMBARRASSMENT BY THE STATE IN THOSE AREAS.

In the last twenty years United States has acquired from the states an immense amount of land for its governmental projects, out of all proportion to acquisitions accomplished theretofore. Those federal projects requiring land within the states have likewise increased in number and difference over that period. Resettle-

ment, reclamation, power, navigation, national parks, military areas, under the auspices of the federal government have required increasing holdings of real estate to be brought within the proprietorship of the national government. Each acquisition has had some immediate detrimental effect in the function of the local political government primarily as a loss of source of revenue from the land and its produce. The states have not been reluctant to acquiesce in the purchase of State lands by the Federal Government, hoping that as time stretched out, the lost revenues would be rejuvenated in greater amounts by the increased activities brought on by the execution of those Federal projects. The co-existence of two sovereign governments in the same area has, however, brought its problems and sources of friction.

Long ago the states began to hedge on the cession of exclusive power of legislation to Congress as contemplated by Article 1, Section 8, Clause 17 of the Constitution. The reservations were recognized early in the nineteenth century with New Hampshire's retention of power to serve State process on military reservations, United States v. Cornell, 2 Mason 60; and it culminated with the State of Washington reserving complete concurrent jurisdiction in Silas Mason Co. v. Tax Commission, *supra*.

Kentucky, it is true, has made no reservations in its general consent to the acquisition of the land by the United States under Clause 17. Nevertheless, the interpretation of the exclusiveness of jurisdiction to the

United States under Clause 17 has not been built on Kentucky consents alone but upon situations arising in all the states. Presently the assumption of jurisdiction under Clause 17 does not mean jurisdiction exclusively in the United States in spite of the wording of that section of the Constitution.

Up to the case of James v. Dravo Contracting Company, *supra*, in 1937, the Court tried to hold to the line of exclusiveness of Federal jurisdiction of property taken under Clause 17, treating reservations of state power as acceptable exceptions to the rule. This is evidenced by the short opinion denying authority of the State in 1934 in Standard Oil Company v. California, *supra*. In Pacific Coast Dairy v. Department of Agriculture, *supra* (1942), the court divided between the mere assertion of the doctrine of exclusiveness of jurisdiction and the practical effect of the California Milk Code upon the governmental function. A great deal of force of the doctrine of exclusiveness of jurisdiction and its effect upon the Federal-State relations within the same area was withdrawn by the decision in the preceding case of Penn Dairies v. Milk Control Commission, 318 U. S. 261, where an opposite conclusion was reached due to the type of tenure of the Federal government. The proprietorship of the Indiantown Gap Reservation was held under a permit from the State of Pennsylvania, while Moffett Field was held with the consent of the State of California.

In both of the State Milk Control cases, the United States Government, through Solicitor General Fahy,

was an active participant in the case in opposition to the State demonstrating the active effect of the State controls upon the functions of the War Department. In the instant case the effect of changing of State political boundaries is completely passive insofar as the functions of the United States. No department of the Federal Government has evidenced any interest at any phase of these proceedings, concerning the outcome of this case.

This practical application of harmony between the Federal and local governments, as manifested by the opinions of this court, has been directly implemented by Congress in its legislation permitting the states to exercise State functions on individuals within those Federal areas. In addition to the Buck Act, here in issue, and the Public Employees' Salary Act, mentioned above, Congress has passed such measures as the Assimilative Crimes Act, Title 18, U. S. C. A., Section 451, and Title 40, U. S. C. A., Section 290, applying State Workmen's Compensation Laws to buildings and works of the United States, and other legislation, integrating Federal functions with those of the surrounding territory.

This trend is pertinent here where the annexation of territory embracing a Federal area has no effect upon, much less embarrassment to, the function of the United States carried on in that Federal area, and, of interest in this case to determine the bar asserted by individual taxpayers seeking to evade the import of a Congressional Act permitting the tax on them.

CONCLUSION.

The success or failure to either party in this suit hinges upon this Court's view of the effect of the timing of the legislative ordinance of the City annexing this territory in relation to the acquisition of the land embracing the Naval Ordnance Plant by the United States and the assumption of "exclusive jurisdiction" over it. The annexation by the City by ordinance under general power given by State statute was a legislative Act of the City affecting the location of Federal land within State political boundaries.

There is no escaping the language of cases from this Court built up during the history of the nation concerning the exclusion of State jurisdiction not specifically retained in areas acquired by the United States with the State's consent. They must be distinguished upon the situations presented involving State-Federal relations within the area.

Without cataloguing each one, let us take those cases cited in Standard Oil Co. v. California, *supra.* Arlington Hotel Co. v. Fant, concerned the imposition of an Arkansas statute relieving hotel keepers of liability for destruction by fire of the property of guests sought to be asserted in determining the liability following the burning of a hotel used in connection with a military hospital. U. S. v. Unzeuta involved a conflict between the State court and Federal court over the jurisdiction of Unzeuta for a murder committed in a railroad car on the right-of-way through

Ft. Robinson. In Surplus Trading Company v. Cook, the State of Arkansas attempted to assess the Trading Company for taxes on personal property still in the warehouses within an Army mobilization training and supply station. Standard Oil v. California itself concerned the imposition of the State tax on gasoline sold and delivered to the post exchange within the Presidio of San Francisco. All of the above represented an active conflict of sovereign authority in the legislative and judicial processses of the States involved, and the United States. In the instant case, we have no conflict of sovereignty but a pure question of political geography.

We have argued that every vestige of jurisdiction of a State is not surrendered to the Federal Government upon the acquisition of land by consent of the State under Clause 17, Section 8 of Article 1 of the United States Constitution for the reason that the United States Government, being a government of delegated powers under the Constitution, cannot assume powers not conferred upon it. And the States, having reserved the powers not granted the United States under the Constitution, may not give up their sovereignty insofar as determining the extent of their own internal political boundaries and the actual land to be embraced therein. The United States, in its governmental functions as delegated to it by the States, has no possible use as a national government for the power of determining those internal boundaries and there can be no constitutional power by implication more than by direct authorization. According to

the Court of Appeals of Kentucky, the Buck Act of Congress receding generally to the States the power to impose local taxes may color the picture of recession of power to determine political boundaries, if the United States has such power, as set out by the Court of Appeals of Kentucky; that Court determined that a recession of power to tax to the local government further receded to the State a power to determine in what local political taxing subdivision the Federal areas were to be located for purposes of the imposition of such tax.

Since Congress has receded the power to tax, the question of political geography of the area in this case should be viewed in relation to the growing tendencies of both Congress and the courts to allow the States to assert their administrative functions as opposed to their plenary sovereign powers where there is no possible interference with the Federal function for which the land was acquired, or is currently being used.

We see no reason why appellants here should be protected from the powers of the local government which have been determined by Congress not to be a burden upon the Federal function, to escape the taxation of the local government by asserting the bar of a provision of the Federal Constitution designed to protect the sovereignty of the Federal Government; or further escape because of the accident of time of acquisition of the property by the Federal Government

which other Federal employees within the area in the same position do not enjoy.

Respectfully submitted,

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APPENDIX.

Kentucky Revised Statutes

3.010 **Consent of state to acquisition of lands.** The Commonwealth of Kentucky consents to the acquisition by the United States of all lands and appurtenances in this state heretofore legaliy acquired, or that may be hereafter legally acquired by purchase, or by condemnation, for the erection of forts, magazines, arsenals, dock yards, post offices, custom houses, courthouses and other needful buildings, and for locks, dams and canals in improving the navigation of the rivers and waters within and on the borders of Kentucky.